



Administrative Tribunal

Distr.: Limited
30 September 2003
Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1110

Case No. 1224: SHA'BAN

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestinian Refugees in the
Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 4 June 2001, Saleh Sha'ban, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 1 October 2001, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal to order:

- a) [that he be restored] to [his] previous post as [Head Teacher] at Qastal.
- b) [the Respondent to issue] a letter of regret to restore [his] dignity.
- c) [to pay] \$10,000 as ... compensation ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 March 2002 and once thereafter until 31 July 2002;

Whereas the Respondent filed his Answer on 25 July 2002;

Whereas on 9 June 2003, the Applicant submitted an additional communication;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 6 September 1971, as an Area staff member on a temporary indefinite appointment as a Teacher "D" Grade 06 at the Tiberias Elementary School, Wavel Camp, Lebanon. After several promotions, effective 1 September 1987, the Applicant was appointed to the post of Head Teacher, and, effective 16 September 1995, he was transferred, as Head Teacher, to Qastal Preparatory School, Baalbeck. Both schools are within the Wavel School Compound.

In October 2000, the Director of UNRWA Affairs, Lebanon, decided that a secondary class should be established in the Wavel School Compound, attached to Qastal Preparatory School. According to a Note for the Record dated 9 October 2000, in view of the added responsibilities, it was decided that the Head Teacher of Tiberias School would be better suited to assume the position of Head Teacher of Qastal School. As a result, the Applicant was transferred to the position of Head Teacher, Tiberias School on the same day.

On 13 October 2000, the Applicant wrote to the Director, UNRWA Affairs, Lebanon, requesting administrative review of the decision to transfer him from Qastal School to Tiberias School. On 19 October, the Deputy Director, UNRWA Affairs, and Field Administration Officer, Lebanon, responded to the Applicant, assuring him that his transfer was not a reflection on his performance but was done in the interest of the Education Programme and therefore the Applicant's grade and salary would not be affected.

On 10 November 2000, the Applicant lodged an appeal with the Area Staff Joint Appeals Board (JAB). The JAB adopted its report on 18 February 2001. Its evaluation and judgement, and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGMENT

...

c) The decision to transfer a staff member from one position to another is considered in the interest of the Agency. As for the Appellant's case it was a cross-transfer and the Appellant remained a Head Teacher and suffered no loss in pay.

d) In this context, the Board by majority vote could not establish that the Administration's decision appealed against had been motivated by prejudice against the Appellant and resolved that the Administration has acted within the framework of standing rules.

IV. RECOMMENDATION

... the Board by majority vote makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed.

DISSENTING OPINION ... :

I disagree with the other board members in that the transfer of the Appellant is a disciplinary measure.

...

RECOMMENDATION

I recommend that the Appeal be reviewed."

On 29 March 2001, the Commissioner-General, UNRWA, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

I have studied the Board's report and agree with the findings of the majority of the Board, as well as with its conclusion that the Administration acted in accordance with Staff Regulations and Rules and without prejudice.

The dissenting Board member appears to be of the opinion that your transfer was a disciplinary measure. This is incorrect. The cross-transfer was a staffing decision which was based on the consideration that the Head Teacher at Tiberias Elementary Boys' School would be more suitable for the position of Head Teacher at Qastal Preparatory School once the secondary class was added to Qastal Preparatory School.

Accordingly, I have accepted the Board's recommendation that the Administration's decision appealed against should be upheld and have dismissed the appeal."

On 1 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent used the wrong criteria to determine the suitability to the post: the Applicant was the more experienced, having served in the post for 16 years, and having improved the levels of success in the Brevet Official Exams.
2. The Applicant was denied due process, particularly in that he was not shown various Notes for the Record containing adverse material relating to him.

3. Although the Applicant's salary and grade were not effected, the transfer to a lower school is a "morale demotion", especially since the two schools are within the same compound.

Whereas the Respondent's principal contentions are:

1. The Applicant's transfer from Qastal School to Tiberias School was within the authority of the Commissioner-General, in accordance with area staff regulation 1.2.

2. The Respondent's decision was an exercise of managerial discretion, based on the relative merits of the two Head Teachers, and was made in the interest of the Agency.

3. The Applicant failed to show that the decision was motivated by bias, prejudice or any improper motive, or that the decision was procedurally defective.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. Prior to 16 September 1995, the Applicant had, for about six years, been Head Teacher at the Tiberias Elementary School, Wavel Camp, situated in the Wavel School Compound in Lebanon. On that date, he was transferred to the post of Head Teacher at Qastal Preparatory School, Baalbeck, which was also situated within the said School Compound. The Applicant served in that capacity, with success and distinction, until October 2000, when he was transferred back to the Tiberias Elementary School as Head Teacher, which position he had held some five years earlier.

II. In October 2000, the Director, UNRWA Affairs, Lebanon, decided that a Secondary School Class should be established within the Wavel School Compound. After consultation with the Department of Education, it was decided that it would be most appropriate to have the new class attached to Qastal School rather than to the Tiberias Elementary School.

The Deputy Chief, Field Education Programme, met with the Acting Area Education Officer, Beqa'a Area, on 9 October 2000, and, having reviewed the two Head Teachers' personnel files, they concluded that Mr. G. S., the Head Teacher of Tiberias School, was better suited for the position of Head Teacher at Qastal School, in preference to the

Applicant. Accordingly, on the same date, the two Head Teachers were switched to their new positions.

III. Area staff rule 1.2 provides that "staff members are subject to the authority of the Commissioner-General and to assignment by him to any of the activities or offices of the Agency in or outside the area of its operations."

The Applicant considers that the transfer from the post of Head Teacher Qastal School to Head Teacher of Tiberias School was in effect a downgrading (albeit that he suffered no alteration in his grade or salary) and a transfer to a less prestigious post. He claims that, as a result, his morale, reputation and career development have been detrimentally affected. The Applicant has not contested the right of management to make such a transfer per se but claims that it should be annulled and that he should be reinstated as Head Teacher at Qastal School, as he contends the criteria on which the decision was made were erroneous or inappropriate. He further contends that he should have been appraised as to what matters and documents were being considered in the selection process and that he should have been afforded an opportunity of being heard in relation thereto. The Applicant also takes issue with some of the conclusions drawn by the Administration as to why they preferred Mr. G.S. to him, claiming that these conclusions were unreasonable and that on any objective and fair assessment, the Administration ought to have concluded that the Applicant was the best suited for the post.

Whilst Staff Regulation 1.2 vests within the Administration a wide discretion in relation to appointments and to the allocation of positions and responsibilities, the Respondent freely admits that such power must not be exercised improperly or abused. With respect to whether a discretionary decision, such as the one contested in these proceedings, had been tainted, the Tribunal has held that, where abuse or prejudice is claimed, "the burden of proving prejudice or other improper motivation rests with the Applicant." (See Judgement No. 1049, *Handling* (2002) citing Judgments No. 613, *Besosa* (1993) and No. 93 *Cooperman*, (1965)) and that "the burden is on the Applicant to present convincing evidence when alleging that the decision ... is tainted by prejudice or improper motivation". (See Judgement No. 874, *Abbas* (1998); also Judgments No. 834, *Kumar* (1997) and No. 553, *Abrah* (1992).)

IV. The Tribunal has carefully examined the record. Whilst the Applicant is correct in saying that he enjoyed much more experience than Mr. G. S., both as a

teacher and a Head Teacher, and that the examination results of the pupils in Qastai School had improved substantially during the period of the Applicant's stewardship, the Tribunal is keen to stress that discretionary decisions, such as the one now under review in these proceedings, are not made by the application of sterile formulae nor are they a mechanical or mathematical process. The discretion to be exercised is the discretion of the Respondent or those to whom he delegates same, and not that of a JAB, the Tribunal or other such body as may be asked to review the decision made. On such a review, the review body would review the contested decision and ask: was it reached on reasonable and rational grounds; was it within the scope of the authority of the person or the body which made it; and, was it fair and free from prejudice. In Judgement No. 1088, *Khader* (2003) the Tribunal stated the following:

"III. The primary purpose and objective of an Administrative Tribunal in reviewing the propriety and efficacy of a challenged administrative decision, is to determine if it was supported by adequate credible evidence and establish that it was made *intra vires* and in accordance with such Rules or Regulations as might apply and that the due process rights of the challenger (the person who has been affected by that decision) and his rights to fair procedures were vindicated in relation to the entire process. This brief description is not intended to be appropriate to all cases or to be exhaustive. In effecting the discharge of its said function, the Tribunal asks itself 'was the decision maker entitled to make the decision under review, was he entitled to accept the evidence relied upon to support it, was he within his powers to make it and was it fair and just, in all of the circumstances?' It is not for the Tribunal to ordinarily embark upon fact finding *de novo* or to seek to substitute its subjective view of the facts in place of the view taken by the decision maker when it finds that the decision-making was *bona fide* and was made on adequate acceptable evidence."

V. It seems clear to the Tribunal that those charged with making the contested decision in these proceedings were not deciding that the Applicant was somehow unsuited for the post as Head Teacher, Qastal School, with its added dimension and responsibilities. Nor were they reflecting adversely on the Applicant's past performance as the Head Teacher of that school. They merely decided that, as between the two candidates, Mr. G.S. was more suitable for the post of Head Teacher of Qastal School after the secondary class was added. This was a decision for them, and for them alone, which should not be interfered with by any review body such as the JAB or this Tribunal, unless satisfied that it was perverse, irrational, prejudiced or based on some improper consideration; or unless otherwise satisfied that there was a clearly identifiable reason, based on cogent evidence, that required, in the interests of justice, that it be annulled. The Tribunal, like the majority of the JAB, can find that no such infirmity has been established by the Applicant.

VI. The Tribunal rejects the view expressed by the dissenting member of the JAB, who considered that the contested decision was unjustified and therefore tantamount to a disciplinary measure against the Applicant. It appears to the Tribunal that the dissenting member fell into error, in that he sought to exercise his own subjective judgment as to which of the two candidates was to be preferred, rather than identifying any fatal shortcomings as to the *manner* in which the decision had been reached by the Administration.

VII. Finally, the Tribunal is satisfied that the Applicant had been adequately and sufficiently acquainted with such personality or temperamental shortcomings or complaints as had been alleged against him and as might have been considered potentially influential, so that it must reject the Applicant's submission that he was treated unfairly by not being afforded a reasonable opportunity of responding to those matters.

VIII. Accordingly, the Tribunal finds that the decision to transfer the Applicant as Head Teacher to Tiberias Elementary School was a valid exercise of the Administration's discretion, that it was not made unreasonably or unfairly or influenced by bias or prejudice or any improper or extraneous consideration.

IX. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Kevin Haugh
Vice-President, presiding

Omer Yousif Bireedo
Member

Jacqueline R. Scott
Member

Geneva, 21 July 2003

Maritza Struyvenberg
Executive Secretary

.../SHA'BAN



Administrative Tribunal

Distr.: Limited
30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1111

Case No. 1210: MILLER

Against: The Secretary-General of the
International Civil Aviation
Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 13 May 1992, Bernard Miller, a staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an Application against the decisions to issue a reprimand to be placed in his personnel file on 6 December 1990, and to withhold his annual increment, due on 2 January 1991;

Whereas on 12 November 1993, the Tribunal rendered Judgement No. 623, *Miller*. The Tribunal considered that "the action taken by the Director of the Bureau of Administration and Services in issuing a written reprimand was in full compliance with the authority vested in him" and that in the decision to withhold the annual salary increment, was "taken after careful consideration" and constituted "a valid exercise of the Secretary General's discretionary authority in the matter, in conformity with the applicable procedures". At the same time, the Tribunal could not overlook the fact that the Applicant was not informed of the withholding of the increment until nine months after it had been implemented and had no opportunity to make representations or seek redress through regular

channels. This, in the Tribunal's view, amounted to a procedural irregularity for which the Applicant was entitled to a monetary compensation of US\$1,500.00.

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 1995 the time limit for the filing of a new application with the Tribunal;

Whereas, on 30 June 2001, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

9. With regard to competence and procedure, the Applicant respectfully requests the Administrative Tribunal:

...

(b) *to find* that the present application is receivable under article 7 of its Statute;

(c) *to find that* ... the Applicant has effectively exhausted all his internal recourses ...

(d) *to determine* that ... it will hold oral proceedings ...

(e) *to determine* that it will hear witnesses and call for the production of documents.

...

(m) On the human rights merits ... *to find*;

...

(n) On the administrative merits ... *to find*;

ADMINISTRATIVE PLEAS

Pleas on Jurisdiction and Competence

...

ADMINISTRATIVE PLEAS ON THE SUBSTANCE

...

The Applicant requests the Tribunal to order that he be immediately reinstated with full back pay and restoration of benefits plus compensation ... and payment of all medical and administrative costs incurred. ... If the Respondent chooses not to reinstate the Applicant, he should pay by way of compensation ... five years' net base salary, plus all costs incurred by [the] Applicant to date as a result of his termination.

...

[The] Applicant requests the Tribunal to order ICAO to pay him [additionally thirty] years' net base salary [as compensation for various wrongs committed].

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 19 October 2001 and once thereafter until 9 November 2001;

Whereas the Respondent filed his Answer on 30 October 2001;

Whereas the Applicant filed Written Observations on 2 December 2001;

Whereas, on 25 April 2002, the Respondent submitted comments on the Applicant's Written Observations, and on 11 June 2002, the Applicant responded thereto;

Whereas on 12 June 2002, the Applicant submitted an additional document;

Whereas, on 26 September 2002, the Respondent submitted additional comments on the Applicant's submission of 11 June, and on 8 November, the Applicant made observations thereon;

Whereas, on 20 February 2003, the Respondent submitted additional comments on the Applicant's observations of 8 November 2002;

Whereas, on 14 and 22 April, 13 May and on 22 and 23 June 2003, the Applicant submitted further documentation;

Whereas, on 10 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case additional to those contained in Judgement No. 623 are as follows:

By memorandum dated 30 January 1994, the Applicant informed the Respondent that as of that date, he was unable to do any further work on the ICAO premises unless changes were made "to make the building safe for me, or medical assistance is provided by ICAO so that I do not become ill within the building". The Applicant did not report to work or present a medical certificate to justify his absence. Subsequently, on 7 February 1994, the Respondent terminated the Applicant's appointment with three months' notice, in accordance with ICAO staff regulation 9.5 (termination by reason of illness), effective 8 May 1994.

The Applicant appealed the decision to terminate his appointment to the Advisory Joint Appeals Board (AJAB), which delivered Opinion No. 106 on 14 November 1994. The AJAB concluded that the Secretary General had acted within the relevant Staff Regulations and Rules in terminating the Appellant's contract, that he had not improperly exercised his discretionary powers in so terminating the Appellant's employment, and that, therefore, the appeal failed. It made the following recommendations:

"288. The Board recommends that the Organization should be prepared to state in response to any future query as to the reasons for the termination of the Appellant's employment that the termination was because he was reacting adversely to the environment in the ICAO building to the extent that he could no longer work there.

289. The Board recommends that, if termination of contracts under the provisions of Staff Regulation 9.5 are being considered in the future, action should not be taken until specific documented medical advice has been obtained. It is further recommended that termination action should not be taken until the Organization has assisted the staff member in pursuing all reasonable means of alleviating the staff member's condition.

..."

On 9 December 1994, the Secretary-General, advised the Applicant as follows:

"..."

I accept the conclusions and recommendations of the Board ... and note the recommendations in paragraph 289. However, I am unable to accept the Board's recommendation in paragraph 288."

On 8 November 1995, the Applicant was informed that the United Nations Joint Staff Pension Board (UNJSPB) "confirmed and noted the unanimous decision and recommendation of the ICAO Staff Pension Committee that you do not qualify for a disability benefit under the terms of Article 33(a) of the Regulations and Rules of the [United Nations Joint Staff Pension Fund (UNJSPF)]. He was further advised that he could request a review of the decision of the ICAO Staff Pension Committee (SPC), which he did. Following the establishment of a Medical Board, the SPC concluded its review in August 1998 and confirmed its earlier decision not to award the Applicant a disability benefit. The Applicant did not appeal this decision to the Standing Committee of the UNJSPB.

On 30 April 1997, following the Applicant's request for compensation under ICAO staff rule 106.5, the Applicant underwent a medical examination by an

outside doctor, as stipulated by the ICAO Advisory Board for Compensation Claims (ABCC). As he was found neither ill nor disabled, the ABCC recommended that no compensation be paid. The Respondent accepted the recommendation and, on 26 June 1997, the Applicant was advised accordingly.

By letter dated 21 July 1997, the Applicant requested the Respondent to review his decision in accordance with ICAO staff rule 106. Another Medical Board was established in accordance with staff rule 106.17 (a), and it submitted a report on 19 May 1998 and further clarification on 29 October 1999. The ABCC concluded its consideration of this matter at its Forty-ninth meeting held on 7 March 2000, and recommended that the Applicant be paid "the salary and allowances which [he] was receiving at the date on which he last attended duty until the expiry of one calendar year from the first day of absence resulting from the illness". On 8 September 2000, the Applicant was informed that the Respondent "had approved, payment of compensation of one year's salary in accordance with Staff Rule 106.5."

On 17 May 2001, the Applicant lodged an appeal with the AJAB on this decision and on "various other matters", however, on 11 July 2001, the Chairman of the AJAB advised him that the Board found that it had no jurisdiction to consider his appeal, since he was "not a staff member of ICAO as indicated in ICAO staff rule 111.1.6."

On 30 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant contends that the Tribunal erred in choosing not to consider and rule on aspects of his pleas in Judgement No. 623, and therefore, requests permission to resubmit those pleas for its reconsideration as an integral part of this appeal.

2. The deliberate actions of ICAO against him, both before and since his dismissal on health grounds, constitute violations of his human rights under the Universal Declaration of Human Rights.

3. The Applicant contends that he is unable to formulate his pleas on the merits fully until he has received the additional documents requested and the requested witnesses have been heard.

4. The Applicant contends that ICAO's actions have made it impossible for him to meet all required deadlines.

Whereas the Respondent's principal contentions are:

1. As neither the rules of ICAO nor those of the UNJSPF permit direct appeal to the UNAT from decisions of the SPC which have not been appealed to the Standing Committee of the Board of the UNJSPF, the Respondent submits that the application to the UNAT in respect of all matters relating to and leading up to and relating to the SPC decision is not receivable.

2. The Respondent does not agree with the decision of the AJAB that it had no jurisdiction to consider the appeal. Therefore, the Respondent requests the Tribunal to remand to the AJAB for appropriate consideration that part of the Application which deals with the proceedings before the ABCC and the Respondent's decision of 8 September 2001.

3. The Respondent submits that the human rights' pleas of the Applicant are not receivable.

4. The matters raised in Judgement No. 623 are *res judicata*.

5. Any other matters falling within the numerous pleas lodged by the Applicant, which have not first been lodged by the Applicant with the AJAB for appropriate consideration, are therefore not receivable.

The Tribunal, having deliberated from 1 to 23 July 2003, now pronounces the following Judgement:

I. The Applicant has submitted three main claims to the Tribunal: the first concerns the termination of the Applicant's appointment, in accordance with ICAO staff regulation 9.5, effective 8 May 1994; the second deals with the 8 November 1995 decision of the UNJSPB to deny the Applicant a disability benefit under the terms of Article 33(a) of the Regulations and the Rules of the UNJSPF; and, the third is against the decision from the ICAO AJAB, communicated to the Applicant in a letter dated 11 July 2001 by the Chairman, that it had no

jurisdiction to consider his appeal, "since you are not a staff member of ICAO as indicated in ICAO staff rule 111.1.6". The appeal to the AJAB was made against the 11 September 2000 decision of the Respondent to accept the ABCC's recommendation to pay the Applicant a compensation of one year salary, in accordance with ICAO staff rule 106.5.

II. The Tribunal will consider each of these claims separately. It notes that the Respondent raises issues of receivability, both for failure to respect the time limits and to follow the required procedures. As such issues of receivability are in the public interest they must be strictly adhered to, in particular deadlines. It is not possible to bring claims after the expiration of the deadline. This applies to the present case, where the Applicant, who is contesting the decision taken on the compensation issue under ICAO staff rule 106.5, tries to revive the two earlier claims, which are time-barred.

The first claim, against the decision to terminate his appointment, dated 7 February 1994, is time-barred. The Applicant filed an appeal against this decision to the AJAB, which rendered its Opinion on 14 November 1994. He did not appeal the Respondent's decision on this Opinion to the Tribunal at the time, although he was granted a deadline until 30 June 1995: he made no formal request to the Tribunal until December 2000, more than five years later, in connection with other issues.

The second claim, dealing with the request for a disability benefit is also inadmissible. First, because the Applicant failed to bring the claim in a timely manner, and also because he did not follow the required procedure of first appealing to the Standing Committee of the UNJSPF. The Tribunal notes that the Applicant was advised that he could request a review of the ICAO SPC's decision and was provided with procedural guidance to that effect. However, the Rules of both ICAO and UNJSPF do not allow appeal to the Tribunal against decisions of the SPC which have not first been appealed to the Standing Committee of the Board of the UNJSPF. This never took place.

III. The Tribunal now turns its attention to the third claim, which obviously is not time-barred or irreceivable on other grounds.

The Applicant initiated, on 14 May 1994, the procedure of obtaining compensation under ICAO Staff Rule 106.5. He underwent medical examinations and finally, on 7 March 2000, the ABCC concluded that in accordance with staff rule 106.5, paragraph 11.1 (b) (ii), the Applicant should be paid the salary and allowances which he was receiving at the date on which he last attended duty until the expiry of one calendar year from the first day of absence resulting from the illness. The ABCC's recommendation was approved by the Respondent on 8 September 2000.

At that time, the Applicant followed two parallel procedures: he appealed to both the Tribunal and the AJAB, against the decision made by ABCC. In his opinion, the matter could be directly submitted to the Tribunal, following precedent found in Judgement No. 435, *Goodchild* (1988). However, ICAO rules require prior submission to the AJAB. Nevertheless, the AJAB, informed him on 11 July 2001 that, "after careful consideration to his averments", it found that it had no jurisdiction, since the Applicant was not a staff member of ICAO, "as indicated in ICAO staff rule 111.16".

The Tribunal holds that the AJAB erred in its decision that it had no jurisdiction over the matter. It notes that the Respondent has stated in this regard that he

"regrettably cannot agree to the decision of the AJAB. It can lead to unconscionable results. Ex-staff members of ICAO have the right, and have had the right, to appeal any matter falling within staff regulation 11.1, in the same manner as current staff members, so long as the cause of action arises as a result of their employment with the organization."

Thus, by so doing, the AJAB did not observe the Applicant's due process rights, for which he deserves to be compensated.

Under the circumstances of the present case, the Tribunal believes that it would serve no purpose to remand the case to the AJAB, as the ABCC already has given the Applicant the maximum amount of compensation allowed under the relevant ICAO Rule, and such a decision to remand would lead to a denial of justice. Thus, the only issue that remains to be resolved is the amount of compensation to be awarded.

IV. The Tribunal will finally deal with the Applicant's attempt to reopen issues raised in his earlier Application in 1992, resulting in Judgement No. 623. According to the Applicant, several of the pleas contained in that Application were not examined by the Tribunal, and thus he requests the Tribunal's permission to resubmit those pleas for its reconsideration as an integral part of his current submission. The Tribunal notes that it had considered these pleas in Judgement No. 623 and had decided to reject them. Thus, these pleas are considered to be *res judicata*, and, therefore, are not subject to further appeal.

V. On the basis of the above the Tribunal:

1. Orders the Respondent to pay the Applicant three months net base salary, at the rate in effect at the time of his separation from service, as compensation for the lack of due process; and,
2. Rejects all other pleas.

(Signatures)

Mayer Gabay
Vice-President, presiding

Omer Yousif Bireedo
Member

Spyridon Flogaitis
Member

Geneva, 23 July 2003

Maritza Struyvenberg
Executive Secretary

/MILLER



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1112

Case No. 1205: SURESH

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Ms.
Brigitte Stern;

Whereas, on 1 November 2000, Lakshminarasimha Suresh, a staff member of the Economic and Social Commission of Asia and the Pacific (hereinafter referred to as ESCAP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 April 2001, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal:

"PLEAS

1. To review the decision of 13th September 2000 and classify the post I occupy at G7.
2. [To upgrade my] post to [the] G7 level on par with Technology Management unit In-Charge to bring parity among the peers of the center.
3. [To recognize] the increased responsibilities from November 1996 and the demonstrated ability to function at a clearly recognizable higher level than my present level ... The difference in salary emoluments should be paid retroactively.

4. To grant special post allowance as entitled by staff rules.
5. [To] award a compensation of US\$ 10,000 for the inordinate delay in classifying my post appropriately and consequent stress, strain and anxiety. ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 15 April 2002;

Whereas the Respondent filed his Answer on 15 April 2002;

Whereas the Applicant filed Written Observations on 15 May 2002;

Whereas the Applicant filed additional documentation on 24 May 2003;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 July 1983, on a fixed-term appointment as a Machine Operator at the BG-1 level with the Asian and Pacific Centre for Transfer of Technology, ESCAP, (ACPTT). He separated from service on 13 May 1993 and periodically thereafter served on special service agreements and one fixed term contract.

On 1 January 1996, the Applicant re-entered the service of ESCAP on a one-year fixed-term appointment as a Publications Clerk at the ND-3 level.

On 30 November 1998, the Applicant submitted a request for reclassification of his G-3 post, asserting that increased responsibilities merited an upgrade of the post to a G-7 level. The subsequent classification analysis resulted in the post being classified at the G-4 level effective 1 March 1999, and on 17 March 1999, the Applicant was so advised. On 12 May, the Applicant appealed to the Executive Secretary, ESCAP.

On 17 December 1999, the Chief, Division of Administration, ESCAP, submitted the appeal to the General Service Classification Appeals Committee (GSCAC). GSCAC responded on 13 March 2000, recommending that the post be reclassified to the G-5 level. On 5 July, the Chief, Division of Administration, informed the Executive Secretary that his Division supported this recommendation.

On 11 September 2000, the Applicant was sent a copy of the GSCAC report and informed that the Executive Secretary had concurred with the recommendation to upgrade the post to G-5.

On 13 October 2000, a vacancy announcement for the post in question was issued. On 10 November 2000, the Applicant was interviewed for the post by the Director, APCTT, his supervisor, but was not recommended. On 16 October 2001, the Chief, Personnel Services Section, advised the Director, APCTT, that the appointment and promotion bodies did not find adequate justification to grant the Applicant an accelerated promotion. On 7 March 2001, the Officer-in-Charge, Personnel Services Section, advised the Director, APCTT, that the Departmental Panel had a reservation in endorsing his recommendation for the promotion of the Applicant.

On 17 April 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent erred in his classification of the post.
2. The Applicant's actual functions differ from the job description of the post.
3. The Applicant is entitled to a special post allowance (SPA).
4. The Respondent did not implement the recommendation of the GSCAC in a timely manner, thus demonstrating prejudice towards the Applicant.

Whereas the Respondent's principal contentions are:

1. The Respondent's discretionary decision with regard to the classification level of the Applicant's post was properly taken following an independent review by a specialized appeals body in accordance with the standards promulgated by the International Civil Service Commission.
2. The Applicant is not entitled to an SPA.

The Tribunal, having deliberated from 10 to 24 July 2003, now pronounces the following Judgement:

I. The Applicant hereby requests the Tribunal to review the decision of 13 March 2000 and classify the post he occupies at the G-7 level. He contends that parity would thus be established with the level of the In-Charge of the Technology Management Unit, APCTT, who is placed at level G-7. He bases his petition on the assertion that the job functions of both posts are equivalent. He also contends that, since November 1996, his post had been assigned increased responsibilities and that, therefore, the difference in salary emoluments between those he received and those corresponding to the G-7 level (the level to which he claims his post should be upgraded) should be paid to him retroactively.

II. The Tribunal has consistently held that decisions relating to classification fall within the discretion of the Respondent. For instance, in its recent Judgement No. 1073, *Rodríguez* (2002), involving similar classification issues, the Tribunal held that:

“the final decision regarding classification of the post fell within the discretion of the Executive Director. (See also Judgement No. 784, *Knowles* (1996).) This discretion is not unfettered, however, as the Tribunal has repeatedly stated that it may be vitiated by the existence of bias, prejudice, discrimination, lack of due process or other improper motivation.”

The Tribunal additionally recalls its Judgement No. 792, *Rivola* (1996), wherein it stated

“[i]t is clear to the Tribunal that it cannot substitute its judgement for that of the Respondent in job classification matters ... The role of the Tribunal is to determine whether, under the circumstances, the Respondent acted within his reasonable discretion.”

In the instant case - as in any case where arbitrariness, discrimination or other such improper motivation is alleged - the *onus probandi*, or burden of proof, rests upon the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); *Knowles, ibid.*; and, No. 870, *Choudhury and Ramchandani* (1998).)

III. Such are, then, the limits to the discretion of the Administration regarding classification of posts. The role of the Tribunal in those cases is not to substitute its judgement for that of the Administration, but to look for the existence of bias, prejudice, discrimination or any other improper motivation, or the violation of the due process of law. To reiterate, the burden of proof rests with the Applicant (see Judgements and No. 553, *Abrah* (1992) and, No. 613, *Besosa* (1993)). The Tribunal is satisfied that the Applicant neither succeeded, nor even seriously attempted, to prove the existence of such vices in the present case. Thus, his claim in this regard must fail.

IV. With regard to the claim for payment of retroactive salary emoluments at the higher level, the Tribunal noted in its Judgement 1064, *Paluku* (2002)

"the Applicant's contention that he was entitled to receive an [special post allowance (SPA)] for the period between 1 August 1990 and 30 June 1991, during which he acted as Officer-in-Charge of the Finance and Administration Section of the Office. Staff regulation 103.11 (b) provides that a staff member given all the responsibilities and obligations of a post higher than his or her own may, in exceptional circumstances, receive an SPA. The granting of such an SPA is far from being a right of the staff member; on the contrary, the text of the regulation leaves no doubt that it is within the discretion of the Administration. Furthermore, as the Tribunal recognized in Judgement No. 336, *Maqueda Sánchez* (1984), '[s]taff employed by the United Nations are often asked to render services of a character and at a level superior to those for which they have been appointed or employed'."

Therefore, this claim must also fail.

V. Regarding what the Applicant terms "the inordinate delay in classifying his post appropriately", the record shows that he submitted a request for reclassification of his G-3 level post, claiming an increase in his functions, on 30 November 1998. The post was subsequently reclassified at the G-4 level, effective 1 March 1999, which decision the Applicant appealed. As a result of that appeal, the post was retroactively reclassified at the G-5 level, effective the same date. The Applicant was notified of this decision on 11 September 2000. The Tribunal is satisfied that, even though the lapse of time to complete the process of post reclassification was somewhat too prolonged, the delay is due to defects in the system of administration of justice in the Secretariat, that precisely

now the General Assembly and some of its auxiliary bodies are trying to streamline and simplify.

VI. However, there is another aspect of this case that the Tribunal would like to review. The Applicant was promoted to the G-4 level on 1 March 1999. On that, the Applicant and the Respondent agree. When the internal vacancy announcement was issued, in October 2000, the Applicant had not completed three years at the G-4 level, the minimum necessary for his promotion to G-5, unless he received an accelerated promotion. In an interview conducted on 10 November 2000, he was found to be not up to the level of efficiency necessary for an accelerated promotion. In this regard, the Chief, Personnel Services Section, advised the Director, APCTT, in November 2001, "that the appointment and promotion bodies at ESCAP did not find adequate justification to grant the staff member accelerated promotion". Accelerated promotion generally demands superior performance which may explain why the examiners during the interview were rather more demanding than usual, despite the fact that the Applicant received the rating of "fully meets expectations" in his PAS of the preceding years. However, the Applicant became eligible for consideration for promotion on 1 March 2002. His PAS for 2002 and 2003 show consistent satisfactory performance. Had his performance been unsatisfactory, this should have been properly reflected in his PAS. This is not the case, and the Applicant continues to this day to perform G-5 level work, being compensated on a G-4 level. The Tribunal does not consider that a staff member should be obliged to perform tasks of a higher level than his or her own for very long periods. The rules which place a limit on the granting of a special post allowance to normally no more than one year would appear to reinforce that opinion. Accordingly, the Applicant should receive compensation.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant the difference in his current salary and that at the G-5 level, with appropriate benefits and entitlements, commencing 1 March 2002, until he is promoted to the G-5 level; and,

2. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Omer Yousif Bireedo
Member

Brigitte Stern
Member

Geneva, 24 July 2003

Maritza Struyvenberg
Executive Secretary

/SURESH



Administrative Tribunal

Distr.: Limited
30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1113

Case No. 1213: JANSSEN

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President, Mr. Mayer Gabay, Vice-President;
Ms. Brigitte Stern;

Whereas, on 20 December 2000, Johannes Janssen, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 July 2001, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal:

“(a) To find that the Respondent did not apply due process regarding the budgetary recognition of the level of the post that the Applicant was encumbering as of 1 September 1989, by repeatedly and deliberately not seeking approval of the General Assembly for budgetary upgrading of the post, although the classification of the post of Chief, Governmental Publications Unit had been approved in 1985 through the statutory procedure.

(b) To find further that the Respondent acted in arbitrary and discriminatory fashion, thereby violating the principles of equal pay for equal work, when not reacting to repeated suggestions made from various competent ... administration offices to ... Headquarters, of using available vacancies for the promotion of the Applicant.

(c) To find also that the Administration violated the obligation of due diligence ...

(d) To decide that the Administration pay the Applicant retroactively the difference in salary, allowances and other entitlements between his actual level and grade until his promotion to the P-3 level on 31 December 1998, and the level of the post that he had been encumbering since 1 September 1989, including a lump sum corresponding to the application of a rate of interest of 5% to all increases in net pay that would have occurred during that period, if the Respondent had applied due diligence.

(e) To decide further that the Administration pay the Applicant a sum in the amount of three months net base salary, in compensation for the damage done to the career prospects of the Applicant as a result of the belated promotion of the Applicant."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2002 and once thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 19 March 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Conference on Trade and Development (UNCTAD), Geneva, on a short-term contract at the G-3 level, as a Library Clerk, on 10 September 1973. After a number of extensions, his appointment was made permanent on 1 June 1979. During the period relating to the instant Application, he held the P-2 level post of Chief, Governmental Publications Unit, Acquisitions and Cataloguing Section, Conference Services Division/Library, United Nations Office at Geneva (UNOG).

On 4 August 1982, a request for reclassification of the post of Chief, Governmental Publications Unit, was submitted by the Conference Services Division. Classification was approved at the P-3 level on 25 January 1985, but budget approval for the post was never received.

Effective 1 September 1989, the Applicant made a lateral move to the post. On 14 July 1992, he was informed that, although the post had been classified at the P-3 level, it remained budgeted at the P-2 level and that no P-3 post in the Library was available against which a special post allowance (SPA) could be paid.

From 19 October 1992 until 6 May 1994, the Applicant served on mission detail in South Africa. On 1 April 1993, he was awarded an SPA to the P-3 level.

On 3 August 1995, the Applicant wrote to the Chief, Personnel Service, UNOG, requesting, that "the administrative decision approving the P-3 level ... be

retroactively implemented as per 1 September 1989 and that [he] be equally granted the thereto related seniority and annual step increments”.

On 12 April 1996, the Applicant asked the Personnel Service, UNOG, for a reply to his letter of 3 August 1995, “to enable me, if necessary, to lodge an appeal under the provisions as set forth in Staff Rule 111.2”. On 15 July 1996, the Chief, Personnel Service, advised the Director, CSD, that an urgent solution to this problem should be identified, in order to avoid Joint Appeals Board and/or Administrative Tribunal procedures. In his response of 27 August 1996, the Director, CSD, advised that the Applicant’s post had been abolished as of 1 January 1996 and “he [had] stopped exercising his former functions”.

On 14 October 1996, the Chief, Personnel Service, requested a new job description for the post, as well as five others which had also been classified at a level higher than that the budgetary level over a decade earlier.

On 12 February 1997, the Chief, Personnel Service, urged OHRM to accommodate the Applicant without further delay. The Assistant Secretary-General for Human Resources Management subsequently advised the Director, CSD, in a memo dated 24 February as follows:

- “1. [...] Acceptable solutions are available to provide a post for [the Applicant] at the appropriate level and such arrangements should be enacted as soon as possible.
2. The case has been reviewed by the Rules and Regulations Unit of the Office of the Assistant Secretary for Human Resources Management. Based on the circumstances as noted, the non-provision of a post for the staff member would appear indefensible by the Administration, should this case proceed to the [Joint Appeals Board (JAB)] and the Administrative Tribunal [...]”

On 15 April 1997, the Chief, Personnel Service, replied that the Applicant could be promoted against a frozen P-3 post if, in turn, the Applicant’s current post could be frozen. He noted that both these posts were “earmarked for discontinuation” with effect from 1 January 1998, and it was expected that the Applicant could be absorbed by CHR, where he was temporarily assigned”.

On 21 November 1997, the Director, CSD, informed the Director, Division of Administration, that no solution had been found for the Applicant once his post was abolished and requested assistance in commencing the administrative procedures for

terminating his contract. On 19 December, the Chief, Personnel Service, replied that, as the Applicant was not prepared to accept an agreed termination, a "suitable placement" had to be found for him.

On 11 August 1998, the Applicant requested permission to submit his case directly to the Tribunal. On 16 September, the Applicant's request was refused on the ground that there were factual issues to be established in his case. Accordingly, his request was treated as one for administrative review.

Pursuant to a recommendation from the Chief Librarian to promote another staff member to the P-3 level, on 6 November 1998, the Chief, Personnel Service, stated that the Personnel Service was unable to support his recommendation given that the Applicant had been performing functions classified at the P-3 level for several years and that no resolution had been found in his case.

On 28 January 1999, the Applicant lodged an appeal with the JAB.

On 1 February 1999, the Chief, Personnel Service informed the Chief Librarian that as the Library had two vacancies at the P-3 level, the Personnel Service intended to submit promotion recommendations for both the Applicant and the staff member recommended by the Chief Librarian. On 24 February, the Deputy Chief, Personnel Administration Section, submitted the Applicant's case to the Appointment and Promotion Committee (APC) UNOG, and indicated that HRMS recommended that the vacancy announcement be exceptionally waived and that the Applicant be promoted with effect from 1 January 1999, the date on which a P-3 post had become available. On 18 March 1999, the Appointment and Promotion Board approved the Applicant's promotion. The Applicant was promoted to the P-3 level with the functional title of Librarian, effective 1 January 1999.

The JAB adopted its report on 22 August 2000. Its conclusions and recommendation read, in part, as follows:

"Conclusions

126. ... [T]he Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the situation of discrepancy between the level of classification and budget of the Appellant's post.

127. The Panel ... finds it highly regrettable that at no time from 1986-1987 biennium until the 1994-1995 biennium, was the budget for the

reclassification of the Appellant's post included in the proposed programme budgets submitted by the Secretary-General.

...

Recommendations

130. The Panel recommends that the administration pay the Appellant in compensation the difference in salary, allowances and other entitlements at the P-3 level, at the appropriate step, and the lower grade post he occupied, from 1 September 1989 until his promotion to the P-3 level on 31 December 1998."

On 4 June 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General considers that, even if a P-3 post had been requested from the General Assembly and the Assembly's approval for such a post had been obtained, it does not necessarily follow that you would have been automatically promoted to that post. In accordance with the Tribunal's jurisprudence, as is pointed out in the Board's report, the classification of a particular post is altogether different from the promotion of its incumbent, whose promotion to the higher level depends on the outcome of the regular review process.

In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the Board erred when it found that you were performing such functions for seven years, as the record indicates that you did not perform those functions when you were on mission assignment ... from 19 October 1992 through May 1994 and, of course, after the post was abolished on 1 January 1996. However, irrespective of how long you actually performed those functions, the Secretary-General considers that the decision to compensate staff for performing higher-level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation. Moreover, para. 7 of administrative instruction ST/AI/277, which is applicable to this case, indicates that, in the context of an upward post reclassification, it is permissible for an incumbent to continue to be remunerated on the basis of the incumbent's lower grade even though the level of the post is higher.

In light of the above considerations, the Secretary-General cannot accept the Board's recommendation for compensation. However, taking into account the totality of circumstances in this case, the Secretary-General agrees with the Board that the Administration was obligated to find a solution to the discrepancy between the level of the functions and the budgetary level of the post and that it should do so in a timely manner. Acknowledging that such a timely solution was not found in your case, he has decided that you should be compensated in the amount of three months net base salary."

On 23 July 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Budgetary approval was never sought to upgrade the post.
2. The Applicant's rights of due process were violated by the actions of the Respondent.
3. There is no evidence to suggest that the Applicant would not have been promoted to the post, had it been upgraded.
4. The Respondent violated the Applicant's right to equal pay for equal work. Further, there were P-3 posts that could have been used to fund the Applicant's promotion.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion, *a fortiori* to retroactive promotion, or to compensation at the promotion level.
2. Additional budgeting had been requested for the Applicant's post, but had not been granted. Even if additional funds had been budgeted for the Applicant's post, the Applicant would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty.
3. The inability to provide budgetary support for the Applicant's post was not improperly motivated.
4. The award of an SPA is discretionary and the Applicant had no right to compensation at the higher level.

The Tribunal, having deliberated from 7 to 24 July 2003, now pronounces the following Judgement:

- I. This is an appeal from the Secretary-General's decision dated 4 June 2001, rejecting the JAB finding that the Organization deprived the Applicant of just compensation by neglecting to obtain budgetary backing for the necessary upgrade to his upgraded post, or to find a suitable substitute higher level position.

II. The Tribunal has long recognized the broad discretionary power of the Secretary-General to promote qualified staff (see Judgement No. 1056, *Katz* (2002)). This power is governed by the strict application of procedural rules and regulations and has been limited in cases of abuse of authority, procedural or substantive errors or irregularities or violations of due process rights. The Applicant in this case urges the Tribunal to recognize that pursuant to the principles of equal pay for equal work, the Organization failed to fulfil its obligations to the Applicant in that respect.

III. On 25 January 1985, the classification of the post of Chief, Governmental Publications Unit, UNOG, was approved at the P-3 level. Despite requests for budgetary approval to implement this classification, such approval was not obtained at the time. On 1 September 1989, the Applicant was transferred to the post. He was told of the unimplemented classification, and advised that there was no other P-3 post in the Library against which he could be placed in order to receive a special post allowance or be promoted.

IV. On 3 August 1995, the Applicant wrote to the Chief, Personnel Service, UNOG, and requested that an administrative decision approving the P-3 level be retroactively implemented as of 1 September 1989.

V. After numerous exchanges between the Applicant and the Organization, in a memo dated 24 February 1997, the Assistant Secretary-General for Human Resources Management recommended to UNOG that a solution to the Applicant's situation be found immediately. On 15 April, the Chief, Personnel Service, UNOG, replied that they were agreeable to promote the Applicant against a frozen post. After months of communication between UNOG and OHRM, as no solution could be found, the Applicant's post was in the process of being eliminated.

VI. On 11 August 1998, the Applicant requested the Organization to implement the decision to promote him or, in the alternative, permit him direct access to the Tribunal. Having received no satisfaction, the Applicant, on 28 January 1999, launched his appeal with the JAB.

VII. On 24 February 1999, the Deputy Chief, Personnel Administration Section, UNOG, submitted the Applicant's case to the Chairperson of the APC, UNOG, and recommended that the Applicant be exceptionally promoted with effect from 1 January 1999, the date on which a P-3 post had become available. On 12 March 1999, the Assistant Secretary-General for Human Resources Management approved the promotion of the Applicant to the P-3 level, with effect from 1 January 1999.

VIII. On 22 August 2000, the JAB concluded that the Respondent had failed in his obligation to regularize the discrepancies between the level of classification and budget of the Applicant's post and recommended that the Applicant be awarded in compensation "the difference in salary, allowances and other entitlements at the P-3 level, at the appropriate step, and the lower grade post he occupied, from 1 September 1989 until his promotion to the P-3 level on 31 December 1998". The Secretary-General awarded Applicant three month net base salary, for the Respondent's failure to act in a timely manner. On 23 July 2001 the Applicant filed this Application with the Tribunal.

The Applicant's position is that the Respondent's decision-making process in this case was seriously flawed and manifestly in violation of the long-standing principle of the equal pay for equal work.

IX. The Respondent asserts that the Applicant did indeed receive full and fair consideration at every stage of the process and the inability to provide budgetary support for the Applicant's post was not improperly motivated. Furthermore, the Applicant could not have been promoted to his reclassified post without budgetary approval and even if obtained, the Applicant would necessarily have been subject to the regular promotion review process. Moreover, in the context of an upward post request for classification it is permissible for an incumbent to continue to be paid on the basis of his lower grade even though the level of the post is higher.

X. It is eminently clear that the JAB unequivocally supported the Applicant's position:

"126. ...[T]he Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the

situation of discrepancy between the level of classification and the budget of the Appellant's post."

...

128. It is regrettable that the situation lasted over ten years until the post was finally abolished, which of course did not erase the problem. For the [Applicant], since he took over the post in 1989, this resulted in performing for seven years the duties and responsibilities of a post classified at the P-3 level with a P-2 salary. After his post was abolished effective 1 January 1996, he was temporarily assigned to the Centre of Human Rights for a period of two years, before he was promoted to the P-3 level on 1 January 1999.

129. The Panel concludes that in this case the principle of equal pay for equal work in conjunction with the principle of due diligence had not been respected."

XI. The Tribunal has consistently held that the Respondent's discretionary powers to promote staff members are subject to Staff Regulation 4.2 and Article 101 of the Charter which states, "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity." (See Judgement No. 828, *Shamapande*, (1997) para.V). In order to achieve this purpose, "It is indispensable that 'full and fair consideration' should be given to all applicants for a post and that the Respondent bears the burden of proof with respect to this." (See Judgement No. 539, *Bentaleb* (1991) and *ibid*, para VI). The Tribunal agrees with the JAB conclusion that Respondent failed to demonstrate that Applicant was provided full and fair consideration and that Respondent adhered to the basic required rules.

XII. The Tribunal concludes that the Applicant is unquestionably entitled to equal pay for equal work, and sustained injury based on the commission by the Respondent of serious procedural mistakes. Consequently, the Tribunal holds that the Respondent's decision not to promote the Applicant violated the Applicant's basic rights. Therefore, the Applicant should be paid retroactively, the difference in salary, allowances and other entitlements between his actual level and grade at the time and the appropriate grade at the P-3 level, from 1 September 1989 until 31 December 1998 as well as the actual equivalent of the loss of pension rights as of September 1989.

XIII. In addition the Applicant should be compensated by six months net base salary for the delays and moral injury he suffered from the Respondent's failure to properly implement the classification of his post.

XIV. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant retroactively the difference in salary, allowances and other entitlements between his actual level and grade at the time and the appropriate grade at the P-3 level, from 1 September 1989 until 31 December 1998 as well as the actual equivalent of the loss of pension rights as of September 1989;
2. Orders the Respondent to pay the Applicant six months net base salary; and,
3. Rejects all other pleas in their entirety.

(Signatures)

Julio Barboza
President

Mayer Gabay
Vice-President

Brigitte Stern
Member

Geneva, 24 July 2003

Maritza Struyvenberg
Executive Secretary

//JANSSEN



Administrative Tribunal

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30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1114

Case No. 1214: AMEEN

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas at the request of Zeyad Easa Mohammed Ameen, a former staff member of the United Nations High Commissioner for Refugees (UNHCR), the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 1 August 2001, the applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 7 November 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"PLEAS:

A: The ... Tribunal is hereby requested to order UNHCR to submit/provide ... documents/witnesses: ...

...

B: The decision of the Chief of Mission, UNHCR, Baghdad ... to withdraw recommendation of [fixed-term appointment] is contested as it was illegal and in violation of the ... Staff Rules and Regulations. Also, the decision to defer issuance of [fixed-term appointment] ... which has never been copied to me, is contested. The decision to abolish my post

without observance of the seniority, post/function essentialness and type of contract is contested. ...

...
D: An amount of **US\$ 250,000.00** ... is requested from UNHCR as ... compensation for the physical and psychological damages ... Also, I am hereby requesting UNHCR to reinstate with immediate effect my contract and post."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and periodically thereafter until 18 October 2002;

Whereas the Respondent filed his Answer on 31 October 2002;

Whereas the Applicant filed Written Observations on 11 February 2003;

Whereas, on 3 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNHCR on 1 November 1995, on a two-month short-term appointment as Assistant at the GL-4 level, in Dohuk, Iraq. His appointment was extended several times. On 7 December 1996, the Officer-in-Charge, UNHCR, Baghdad, recommended that the Applicant be granted a fixed-term appointment to fill the post of Senior Field Assistant, Dohuk, a position he had been occupying on short-term contracts since April 1996.

On 13 February 1996 (sic.), the Field Office, Dohuk, was informed that it had not been possible to obtain an ID card for the Applicant from the Iraqi Ministry of Foreign Affairs (MOFA). Subsequent efforts were made to acquire an ID card for the Applicant. In the meantime, the Applicant continued to be employed on short-term appointments.

On 11 May 1997, the Applicant was informed that efforts to get him an ID card had not yet been successful; that without an ID card, he would be restricted in his ability to leave his duty station for travel to Baghdad or abroad and, consequently, his services would not be efficiently utilized; and that, pending response from MOFA, his short-term appointment would be extended until the end of June 1997.

On 30 June, the Division of Human Resources Management, Geneva, (DHRM) informed the Chief of Mission, Baghdad, that UNHCR-Baghdad, was to continue

negotiations with MOFA and that the matter should be taken up at the inter-agency level. Until a solution is found, the Applicant's appointment was to be extended on a monthly basis. The Applicant was informed of this on 12 July.

On 24 November 1997, the Chief of Mission, Baghdad, informed DHRM, that MOFA had approved the issuance of ID cards to several local staff members, including the Applicant. Therefore, he confirmed the request of 7 December 1996, recommending that the Applicant be granted a fixed-term appointment as of 1 December 1997. On 1 May 1998, the Applicant was granted a one-year fixed-term appointment as Senior Field Clerk, Dohuk, at the GL-4 level.

On 10 July 1998, the Applicant requested that the effective date of his fixed-term appointment be changed from 1 May 1998 "to the neighbourhood of December 1996".

On 15 September 1998, DHRM wrote to the Applicant informing him that, following a programmatic review of the operations in Iraq, his post had been slated for abolition. Consequently, his appointment would be terminated effective 30 September 1998 and he would receive compensation in lieu of notice as well as termination indemnity. The Applicant separated from service on 30 September.

On 24 November 1998 the Applicant requested the Secretary-General to review the administrative decision to terminate his contract and the decision to defer the issuance of his fixed-term appointment.

On 5 March 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 15 December 2000, the JAB adopted its report. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

70. Therefore, the Panel concluded that the Appellant's appeal against the 'decision to defer the issuance of his fixed-term appointment' was time-barred and not receivable.

...

79. ... the Panel underlined ... that, it can examine whether the established procedure has been followed ... But, the Panel cannot enter to examine the necessity to abolish or not a given post or to choose between two posts, which one must be abolished.

...

81. ... the Panel deemed that, the Appellant did not provide evidence in support of ... alleged discrimination.

...

Conclusions and Recommendations

87. The Panel **concludes** that the appeal against the decision to defer the issuance of the Appellant's fixed-term appointment is irreceivable.

88. The Panel **concludes** that the decision to terminate the Appellant's contract following the abolition of his post was not tainted by procedural flaw or irregularity and that according to the applicable law, all the amounts to which the Appellant was entitled to, have been paid to him.

89. Therefore, the Panel makes **no recommendation** to the Secretary-General in support of the present appeal."

On 24 January 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's conclusions and had decided to take no further action on his appeal.

On 7 November 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The termination of the Applicant's contract was unfair and unjustified. No consideration was given to his contractual status, the functions he fulfilled or his seniority.

2. The Respondent erred when insisting that the Applicant have an ID card issued by the Iraqi Government as a precondition to granting him a fixed-term appointment.

3. The Applicant suffered discrimination.

4. The deferment of granting him a fixed-term appointment delayed the Applicant's promotion, impeded his participation in the UNJSPF and deprived him of dependency allowance.

Whereas the Respondent's principal contentions are:

1. The Applicant's rights were not violated by the Administration's decision to terminate his fixed-term appointment following the abolition of his post.

2. The Applicant's rights were not violated by the Administration's deferral in granting him a fixed-term contract.

The Tribunal, having deliberated from 3 to 24 July 2003, now pronounces the following Judgement:

I. The Applicant joined UNHCR in Dohuk, Iraq, on 1 November 1995, on a short-term appointment at the GL-4 level. His appointment was extended numerous times, until 30 April 1998. On 7 December 1996, the Applicant was recommended for the post of Senior Field Assistant in the Dohuk field office, and it was further recommended that he be granted a fixed-term contract. Effective 1 May 1998, the Applicant was granted a fixed-term appointment, under which he served until his separation from service, on 30 September 1998.

II. The initial request and recommendation for granting the Applicant a fixed-term appointment was not implemented, due to the Iraqi government's refusal to grant him a MOFA ID card, as in the absence of such a card, it would have been practically impossible for the Applicant to fully exercise the functions and duties required of him in the new post. The Applicant consequently was kept on short-term contracts, pending the issuance by the Iraqi authorities of a MOFA ID card. During this period, UNHCR continued in its efforts to obtain the card for the Applicant, until it was finally received, on 24 November 1997.

III. On 25 September 1998, DHRM advised the Applicant that his post was among several posts slated for abolition and that therefore his contract would be terminated, with effect from 30 September 1998. The Applicant was further informed that he would be paid compensation in lieu of notice in accordance with staff rule 109.3, as well as termination indemnity in accordance with staff regulation 9.3 (a).

On 24 November 1998, the Applicant requested administrative review of both the decision to terminate his appointment and the decision to defer the issuance of his fixed-term contract as a Senior Field Assistant in the Dohuk Field Office. On 5 March 1999 the Applicant lodged an appeal with the JAB.

IV. The Tribunal first turns its attention to the request for review of the administrative decision to defer the issuance of the Applicant's fixed-term contract.

The Tribunal concurs with the JAB that this request is time-barred and therefore not receivable. Staff rule 111.2(a) requires that a staff member request administrative review within two months of receiving notification of the contested decision. Accordingly, the deadline for the Applicant to request administrative review had already expired when the request was made. Staff rule 111.2(f) states that "[a]n appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived ..."

The Tribunal has consistently held that time limits are of utmost importance for the functioning of the Organization and must therefore be strictly adhered to. (See Judgements No. 579, *Tarjouman* (1992); No. 1046, *Diaz de Wessely* (2002).)

The Applicant failed to keep the prescribed time limits and the Tribunal, like the JAB, is not satisfied that there were circumstances warranting their waiver. Consequently, the Applicant's request regarding the delay in the issuance of his fixed-term appointment is not receivable.

V. The Tribunal turns now to the Applicant's request, to annul the Organization's decision to separate him from service.

The Tribunal notes that, the Applicant was separated from service due to the abolition of his post, which was amongst several posts slated for abolition. The Tribunal's jurisprudence is consistent in affirming the Secretary-General's discretion in the management of the Organization. This includes the authority to reorganize, redeploy and hire and fire staff members. The Tribunal will not interfere with the Secretary-General's exercise of this discretionary power, except for cases where it considers that the decision was reached in violation of a staff member's rights, or that it was procedurally flawed. (See Judgements No. 632, *Mughir* (1993) and No. 732, *Akkawi* (1995) where it was stated that "the Tribunal will not enter into the merits of the reasons for the abolition. It examines the reasons proffered only to discover whether the case put forward by the Respondent could be said to be perverse in the circumstances.")

The Tribunal notes the JAB's conclusion that, the aforesaid decision was reached at without violating the Applicant's rights. Having reviewed the file, the Tribunal is satisfied that this decision was not tainted by procedural flaw or irregularity, nor did it violate the Applicant's rights. Furthermore, the Applicant's separation from service was carried out in compliance with the Staff Regulations

and Rules, as cited in the separation letter, and all amounts which were due to the Applicant were indeed paid to him.

VI. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin Haugh
Vice-President, presiding

Omer Yousif Bireedo
Member

Spyridon Flogaitis
Member

Geneva, 24 July 2003

Maritza Struyvenberg
Executive Secretary

/AMEEN



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1115

Case No. 1215: RUSER

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President, Mr. Mayer Gabay; Ms. Brigitte Stern;

Whereas, on 21 August 2001, Ursula-Maria Ruser, a former staff member of the United Nations, filed an Application containing pleas which read as follows:

"II: PLEAS

...

8. On the merits, the Applicant respectfully requests the Tribunal to find:

- a) that the Respondent arbitrarily rejected the [Joint Appeals Board (JAB)'s] recommendations;
- b) that the Applicant should have rightfully been paid at the P-4 level throughout her tenure as Chief of League of Nations archives; and
- c) that the Applicant's case was treated unfairly, inasmuch as the principle of equal pay for equal work was violated when budgetary provisions for her post, classified at the P-4 level, were never requested from the General Assembly throughout her seven-year tenure of the post, despite repeated complaints by the Applicant lodged as early as 1993.

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9. Wherefore the Applicant most respectfully requests the Tribunal to award her the difference in salary, allowances and other entitlements between her effective level and grade and the appropriate grades at the P-4 level from 1 December 1991 until her retirement on 30 November 1998, as well as the actuarial value of the pension rights foregone as of 1 December 1998."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2002 and thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 28 February 2002;

Whereas the President of the Tribunal granted an extension of the time limit for filing Applicant's written observations until 4 May 2002;

Whereas the Applicant filed Written Observations on 27 April 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 2 November 1980, on a two-year fixed-term appointment at the P-3 level as Records Management Officer (Archivist), Office of General Services Communication, Records and Commercial Services Division. Her contract was periodically extended until 1 November 1989, when she was granted a permanent appointment. During the events which gave rise to this Application, she held the P-3 level post of Chief, League of Nations Archives and Historical Collections Unit, Conference Services Division/Library, United Nations Office at Geneva (UNOG).

On 8 March 1985, a request for reclassification of the post of Chief, League of Nations Archives and Historical Collections Unit was submitted by the Conference Services Division. Classification was approved at the P-4 level on 18 September 1985. Due to financial constraints, a budget request for the classified post was included only in the proposed programme budget for the biennium 1990-1991. This and subsequent requests made for the biennia 1992-1993, 1994-1995, 1996-1997, were also rejected.

On 5 November 1990, the Acting Chief, Compensation and Classification Service, had informed the Personnel Section, UNOG, as follows:

"As per the [Assistant Secretary-General of Human Resources Management's] instruction dated 16 August 1988, if the classified level of a post is higher than the budget level, the department must either (a) obtain the appropriate funding

or (2) redesign the job to match the budget level of the post. The purpose of this policy is not only to ensure the appropriate allocation of resources but also to apply the principle of equal pay for work of equal value.

We have reviewed the functions of the subject post and regrettably, can identify no basis for its redesign at the P-3 level. This is due to the unique character of the post within the Geneva Library. Accordingly, a solution should be found budgetarily."

Effective 1 December 1991, the Applicant made a lateral move to the post.

On 18 August 1993, the Applicant asked the Appointment and Promotion Committee (APC) to put her post on the P-4 promotion register. In its reply of 14 December, the APC informed the Applicant that "the re-examination of your case by the Appointment and Promotion bodies did not reveal that there were sufficient grounds to amend their previous decision".

On 1 November 1995, the Applicant addressed the Director, CSD, asking him for support in regularizing her situation, reiterating her request on 16 November, to the Director-General. On 14 January 1997, in response to a request from the Chief, Personnel Service, UNOG, for a new job description for the post, as well as five others which had also been classified at a level higher than that the budgetary level over a decade earlier, the Chief Librarian stated that the job description for the Applicant's post "ha[d] not changed very much in essence, except for the fact that new information technologies are applied in certain areas". On 15 April 1997, the Chief, Personnel Service, confirmed that the functions of the Applicant's post met the criteria for classification at the P-4 level. The Applicant, relying on this confirmation wrote to the Chief, Personnel Service, asking for his support "in implementing the P-4 level of this post retroactively to the date of reclassification". On 17 December 1997, the Chief, Personnel Service, replied as follows:

"You correctly state that the functions of the post you have been encumbering for over six years have been evaluated to be classifiable at the P-4 level. You are also probably aware that the budgetary level of your post is one grade lower than the classification findings. Consequently, it has not been possible to formally classify your post and issue the correspondent classification notice.

The financial constraints of the Organization have not enable your Division to modify the budgetary provisions of your post for the current biennium. We understand, from a conversation with the Chief Librarian, that a request for upgrading this post to the P-4 level was made, but unfortunately turned down at Headquarters. No other alternative exist within your Division to make your promotion feasible."

On 30 November 1998, the Applicant retired.

On 27 December 1998, the Applicant requested the Secretary-General to review the administrative decision not to implement her post at the P-4 level and retroactively adjust her level.

On 10 April 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 August 2000. Its conclusions and recommendations read, in part, as follows:

"Conclusions

93. ... [T]he Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the situation of discrepancy between the level of classification and budget of the Appellant's post.

94. The Panel finds it highly regrettable that at no time from the Biennium for 1988-1989 until today, the budget for the reclassification of the post of the Appellant was included in the proposed programme budgets submitted by the Secretary-General.

...

Recommendations

97. Consequently, the Panel recommends that the administration pay the Appellant retroactively in compensation the difference in salary, allowances and other entitlements between her actual level and grade at the time and the appropriate grade at the P-4 level from 1 December 1991 until her retirement on 30 November 1998 as well as the actuarial equivalent of the loss of pension rights as of 1 December 1991."

On 4 June 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's findings and conclusions ...

The Secretary-General considers that, even if a P-4 post had been requested from the General Assembly and the Assembly's approval for such a post had been obtained, it does not necessarily follow that you would have been automatically promoted to that post. In accordance with the Tribunal's jurisprudence, as is pointed out in the Board's report, the classification of a particular post is altogether different from the promotion of its incumbent, whose promotion to the higher level depends on the outcome of the regular review process.

In considering the Board's recommendation that you should be compensated for the higher-level functions you performed, the Secretary-General observes that the decision to compensate staff for performing higher-level functions is discretionary and subject to the availability of a post. In the absence of an available post in this case, there is no abuse of discretion in deciding not to pay such compensation. Moreover, para.7 of administrative instruction ST/AI/277, which is applicable to this case, indicated that in the context of an upward post reclassification, it is permissible for an incumbent to continue to be remunerated on the basis of the incumbent's lower grade even though the level of the post is higher.

In light of the above considerations, the Secretary-General cannot accept the Board's recommendation of compensation. However, taking into account the totality of circumstances in this case, the Secretary-General agrees with the Board that the Administration was obligated to find a solution to the discrepancy between the level of the functions and the budgetary level of the post and that it should do so on a timely manner. Acknowledging that such a timely solution was not found in your case, he has decided that you should be compensated in the amount of three months net base salary at the rate in effect at the time of your separation from service."

On 21 August 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the principle of equal work for equal pay in denying the Applicant adequate compensation for the work she performed.
2. In placing the Applicant against the post, the Respondent performed a review process tantamount to a promotion exercise.
3. The Applicant is entitled to compensation for the delays in her case.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion, *a fortiori* to retroactive promotion.
2. Additional budgeting had been requested for the Applicant's post, but had not been granted. Even if additional funds had been budgeted for the Applicant's post, the Applicant would have been subject to a regular promotion review process, the outcome of which could not be anticipated with certainty.
3. The inability to provide budgetary support for the Applicant's post was not improperly motivated.

4. The award of a Special Post Allowance is discretionary and the Applicant had no right to compensation at the higher level.

The Tribunal, having deliberated from 11 to 24 July 2003, now pronounces the following Judgement:

- I. The Applicant is appealing hereby the Secretary-General's decision dated 4 June 2001 to reject the JAB's recommendations in her favour. Concluding that the Respondent violated the principle of equal pay for equal work, the JAB found that as a result of Respondent's failure to correct the discrepancy between the level of classification and the budget of her post, the Applicant was denied proper compensation for her work.

- II. It is well established that the Organization is empowered with wide ranging discretionary control over matters involving promotions (see Judgement No. 1056, *Katz* (2002)). Nevertheless, the exercise of that power is not without its limits. The Tribunal has defined and clearly imposed restrictions on its application, for example, in cases of management abuse of authority, procedural or substantive error or due process denials. (See Judgement No. 1031, *Klein* (2001).)

- III. The Applicant seeks redress for the Respondent's failure to pay her proper salary and other entitlements on a par with the job functions she had actually performed.

- IV. The Applicant began her career with the Organization on 2 November 1980 and attained permanent status on 1 November 1989. On 1 December 1991, the Applicant was transferred to the post of Chief, League of Nations Archives and Historical Collections Unit, in the Library, UNOG, at the P-3 level.

- V. On 8 March 1985, a request for reclassification of the Applicant's post was submitted and approved at the P-4 level on 18 September of that year, subject to budgetary provisions. A budget request was not submitted until the proposed budget for the biennium 1990-1991 but this request and subsequent were rejected. In August 1993, the Applicant asked the Geneva Appointment and Promotion Committee to put her post on the P-4 promotion register, but her request was denied.

VI. On 27 December 1998, the Applicant requested the Secretary-General to review the administrative decision not to implement her post at the P-4 level and retroactively adjust her level, and to provide appropriate financial adjustment to equalize her compensation with her actual work for the entire period of her employment as Chief of her office.

VII. On 30 November 1998, the Applicant retired at P-3, step 15 level, and on 10 April 1999 filed an appeal with the JAB in Geneva against the administrative refusal to advance her post to the P-4 level. As part of its decision the JAB recommended that the Organization pay the Applicant the salary differential. On 4 June 2001 the Applicant was informed that the Secretary-General rejected the JAB's recommendation. This Application followed.

VIII. In effect, the Applicant claims she was improperly and unjustly compensated when the Organization failed to remedy the discrepancy that existed between the budgetary level of her post and the higher level job functions she actually performed.

IX. Not surprisingly, the Respondent asserts that the Applicant did not have a right to promotion, *a fortiori* to retroactive promotion, maintaining that he possesses wide discretionary powers in promotional matters. The Tribunal indeed, concedes that appointments and promotions are within the broad discretion of the Secretary-General but as stated earlier, this power is neither absolute nor unfettered (see Judgement No. 870, *Choudhury and Ramchandani* (1998) para. IV).

X. Claiming that the Applicant indeed received full and fair consideration at every stage of the process and that the inability to provide budgetary support for the Applicant's post was not improperly motivated, the Respondent submits that, notwithstanding any other consideration, the Applicant could not, at any rate, have been promoted to her reclassified post without such budgetary support. Moreover, even if such budgetary support had been available for the Applicant's post, the Respondent states, the Applicant would have been required, in any event, to undergo a regular promotion review process. In response, the Applicant claims that the

decision-making process was flawed, not timely, and violated her due process rights and her right to full and fair consideration.

XI. The JAB, in support of the Applicant's position, made the following recommendation:

"The Panel concludes that on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the situation of discrepancy between the level of classification and the budget of the Appellant's post ...

It is regrettable that this situation is still not resolved. For the Appellant, since she took over the post in 1991, this resulted in performing for seven years the duties and responsibilities of a post classified at the P-4 level with a P-3 salary until she took her retirement in 1998."

XII. The Tribunal has recognized that the Respondent's discretionary power to promote staff members is subject to Article 101 of the Charter and staff regulation 4.2 which states "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". In order to achieve this purpose, "It is indispensable that "full and fair consideration should be given to all applicants for a post and that the Respondent bears the burden of proof with respect to this". (See Judgement No. 828, *Shamapande*, (1997) paras. V and VI.).)

XIII. The Organization was under a strict obligation to regularize the Applicant's post and correct the discrepancy between the level of classification and her actual job function. The Respondent's failure to do so, violated the Applicant's right to full, fair and just consideration. Thus, the Applicant should be paid retroactively the difference in salary, allowances and other entitlements between her actual level and grade at the time and the appropriate grade at the P-4 level from 1 December 1991 until her retirement on 30 November 1998 as well as the actual equivalent of the loss of pension rights as of 1 December 1991.

XIV. In addition the Applicant should be compensated by six months net base salary for the delays and moral injury she suffered from the Respondent's failure to properly implement the classification of her post.

XV. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant retroactively the difference in salary, allowances and other entitlements between her actual level and grade at the time and the appropriate grade at the P-4 level from 1 December 1991 until her retirement on 30 November 1998 as well as the actual equivalent of the loss of pension rights as of 1 December 1991;
2. Orders the Respondent to pay the Applicant six months net base salary at the rate in effect on the date of separation from service; and,
3. Rejects all other pleas in their entirety.

(Signatures)

Julio Barboza
President

Mayer Gabay
Vice-President

Brigitte Stern
Member

Geneva, 24 July 2003

Maritza Struyvenberg
Executive Secretary

PLNER